In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1561

JAMES MARIHART, EDWIN KINSLEY, AND MICHAEL GUERRA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment filed on March 22, 1972 in the United States District Court for the Northern District of Iowa charged petitioners with four counts of possessing firearms as previously convicted felons, in violation of 18 U.S.C. App. 1202(a)(2). On April 25, 1972 the district court granted petitioners' pretrial motion to suppress. The court of appeals, sitting *en banc*, reversed, *United States* v. *Marihart*, 472 F. 2d 809 (C.A. 8), two judges dissenting (Pet. Supp. App. 1-19). Thereafter, petitioners were tried and convicted on all four counts. Each was sentenced to imprisonment for consecutive terms of two years on counts 1-3 and a concurrent two-year term on count 4. The court of appeals affirmed on March 6, 1974 (Pet. Supp. App. 20-30). The petition for a writ of certiorari, filed on April 8, 1974, is out of time under Rule 22(2) of the Rules of this Court. In any event, petitioners present no claim warranting further review.

1. The evidence showed that George Lorenger operated a firearms dealership from his home in Sioux City, Iowa. The firearms, consisting largely of rifles and shotguns, had been purchased from out-of-state wholesalers (Tr. 26-35, 47). On the evening of October 16, 1971, burglars entered Lorenger's home and removed thirty-four firearms. Seventeen were immediately recovered from an area in the rear of the house (Tr. 48-49)[1]. The following day an informant contacted F.B.I. agent David Oxler (who was at the time unaware of the burglary) and identified petitioners by name as the culprits. The informant also gave a detailed description of the Ford station wagon used in the burglary (Tr. 305-312, 331-332). Oxler passed this information along to the local chief of detectives, Captain Francis O'Keefe.

The same day Detective Lieutenant Michael Larson received a telephone call from one of his confidential informants (not the same informant who contacted Oxler) who related to Larson the identical information about the burglary, the names of the wrongdoers (petitioners) and the vehicle. Larson immediately notified Captain O'Keefe of his information (Tr. 342-343). Then, Police Sergeant Raymond Stewart relayed to Captain O'Keefe identical information concerning the burglary received from his informant (Tr. 237-239)[2].

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[1]We are lodging with the Clerk of this Court the three-volume transcript of trial, also containing the hearing on petitioners' renewed motion to suppress, conducted intermittently during the trial.

[2]At an *in camera* hearing during trial, the district court ascertained that the same informant had provided information about the burglary to both Oxler and Stewart. See note 6 of the opinion of the court of appeals in *Marihart II* (Pet. Supp. App. 27).

Prior to October 20, the F.B.I. was not investigating this offense, believing it to be local in nature. However it was investigating at least one of the petitioners for a crime involving stolen money orders; accordingly, when, on October 20, agent Oxler's informant reported that petitioners were about to use the Ford station wagon to move certain unidentified "hot" goods, he assigned agent Roger Okuniewicz to locate and watch the vehicle, and requested assistance from Captain O'Keefe (Tr. 313-314, 321-322). O'Keefe dispatched Sergeants Stewart and Wilson and Detective Holly Barron to the 1800 block of Jackson Street, where the vehicle had been sighted. Before the arrival of the city policemen, Okuniewicz observed petitioners back the station wagon to the front porch of 1807 Jackson Street, open the tailgate, and remove therefrom a large, heavy cardboard box which all three carried into the apartment building (Tr. 82). Stewart and Wilson arrived in time to see petitioners leave the apartment building empty handed and drive away together in the station wagon (Tr. 175-176). Then, the officers made inquiry of a tenant in the apartment building and ascertained that petitioners had entered a vacant apartment. Leaving Barron behind to continue a surveillance, the other law enforcement officers left to meet with Captain O'Keefe and agent Oxler for the purpose of obtaining a search warrant.

Three hours later, armed with a warrant issued by a State judge, Officers Stewart, Wilson and Barron searched the vacant apartment and discovered the seventeen missing firearms stacked in a closet and the large cardboard box nearby (Tr. 132-135, 177-179).

2. Petitioners allege that the affidavit supporting the warrant issued to search the apartment wherein the firearms were discovered failed to meet the standards enunciated by this Court in Aguilar v. *Texas*, 378 U.S.

108, and *Spinelli* v. *United States*, 393 U.S. 410.[3] The affidavit, set forth *in toto* at Pet. App. 17-20 and in *Marihart I*, 472 F. 2d 809, 810, n. 2, initially referred to the occurrence of the burglary at the Lorenger home. Then the affiant, Captain O'Keefe, stated that he had received information from a "reliable confidential informant" that petitioners were involved in the burglary, and at the time were driving a 1962 blue Ford station wagon, Iowa plates 47-4556, registered to one Ray Magnuson. O'Keefe related information from F.B.I. agent Oxler relative to the observation of petitioners driving to 1807 Jackson Street in that station wagon, and unloading a large weighty box into a vacant apartment of a dwelling under the custody of Ray Magnuson. Finally, the affiant indicated that Oxler was familiar with petitioners and the vehicle as a result of prior investigations.

Both the district court and court of appeals found that the affidavit contained sufficient corroborative information to support the credibility of the unnamed informant. The issue upon which those courts could not agree involved the presence of adequate underlying circumstances from which the informant drew his conclusion regarding the criminal conduct of petitioners. *Aguilar*, *supra*, 378 U.S. at 114. The majority of the court of appeals properly analyzed this issue in *Marihart I*, finding that any defects in the affidavit as judged by *Aguilar* were overcome by the detailed nature of the informant's report, the prior knowledge of the affiant (independent of the informant's revelations) that the burglary had occurred, the corroboration by agent Oxler and the oral testimony before the

[3]Although we address ourselves to the merits of petitioners' claims, we have not abandoned our contention, raised in the courts below, that petitioners lack standing to contest the search of the vacant apartment. See *Brown* v. *United States*, 411 U.S. 223. We devote our brief to a review of petitioners' claim in recognition of the decision by the court of appeals to do the same and electing not to base its holding on the question of standing. 472 F. 2d at 811-812; Pet. Supp. App. 7.

issuing State magistrate[4] (Pet. Supp. App. 8-15). See *Draper* v. *United States* 358 U.S. 307; *United States* v. *Harris*, 403 U.S. 573, 580-583; *Whiteley* v. *Warden*, 401 U.S. 560, 565, n. 8; *Spinelli* v. *United States*, *supra*.

3. Petitioners also claim that Captain O'Keefe made material misstatements in his affidavit and testimony before the issuing judge. In support of this contention they rely upon the trial testimony of agent Oxler and policemen Larson and Stewart.[5] But a reading of this testimony in context does not sustain petitioners' argument.

Initially, petitioners point to the representation by O'Keefe in his oral testimony that Oxler stated that he "seriously doubted" mentioning the informant's name to O'Keefe (Pet. 11-12). However, this discrepancy is slight in light of Oxler's admission that without doubt O'Keefe was aware of the identity of the informant from previous encounters and that it was simply unnecessary to state the name (Tr. 334-335). As stated by Oxler, the informant's name "was known as a fact between us even though names aren't mentioned" (Tr. 335). The crucial question is not whether Oxler made a particular statement attributed to him in the affidavit regarding the name of the informant but whether the identity of the informant whose name was revealed to the State judge and recognized as previously reliable was correct. It is clear that there was no misidentification.

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[4]The testimony of Captain O'Keefe before a State court has been incorporated into this record, and is set forth at Pet. App. 21-26. There, Captain O'Keefe stated that he furnished the issuing judge with additional information, supplementing the affidavit, such as the reports of Larson and Stewart containing the identical information as that given by Oxler (albeit from separate sources) and the identities of the two informants, one of whom was known to the judge, who issued the warrant, as having been reliable in the past.

The other incident which petitioners specifically point to (Pet. 12-13) deals with O'Keefe's statement at the State court hearing that Oxler had passed along to him the description of the station wagon used by the burglars. At trial, Oxler was asked whether his informant had given him a description of the vehicle; Oxler replied, "I cannot say for sure. I do not know" (Tr. 332). Petitioners misinterpret the agent's response as an admission that he was unaware of the identity of the station wagon when he relayed information to O'Keefe concerning the burglary. In fact, the agent merely remarked that at the time he was testifying—more than a year after the offense and the conversations occurred (Tr. 339)—he could not recall exactly what information he had given to O'Keefe. However, agent Oxler maintained that he had been aware of the station wagon both from his own surveillances of petitioners and the conversations with his informant (Tr. 331), and that he had indeed related to O'Keefe "details as to the information I had available" (Tr. 334, 335). Thus, petitioners have not shown that O'Keefe's statement as to the source of his knowledge of the description of their vehicle was a misrepresentation. See *United States* v. *Various Gambling Devices*, 478 F. 2d 1194, 1199 (C.A. 5)[6].

Because petitioners have failed to demonstrate the existence of any misrepresentations, the Court at this juncture need not resolve any differences which might exist among courts of appeals on the question whether misrepresenta-

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[5]Captain O'Keefe was not called by any of the parties at trial.

[6]Other alleged misstatements argued to the court of appeals and not repeated here are equally insubstantial. See the opinion of the court below (Pet. Supp. App. 26-28).

tions by an affiant, even if innocent, should be disregarded in determining whether the magistrate has been furnished with sufficient probable cause to issue a warrant. Compare *United States* v. *Carmichael*, 489 F. 2d 983 (C.A. 7, with *United States* v. *Thomas*, 489 F. 2d 664 (C.A. 5)[7].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[7]Both *Carmichael* and *Thomas* hold that a deliberate misrepresentation, even if immaterial to the showing of probable cause, will invalidate a warrant. *Thomas* further holds that an unintentional misrepresentation, if essential to the showing of probable cause, will invalidate a warrant (489 F. 2d at 669); whereas *Carmichael* would not invalidate a warrant containing a material misrepresentation unless it was made recklessly (489 F. 2d at 989). Petitioners do not claim that the alleged misstatements by Captain O'Keefe were deliberately or recklessly made and therefore do not rely on *Carmichael*. *Thomas* does not avail petitioners because the alleged misstatements were not material to the showing of probable cause; that is, their elimination would not negate the existence of probable cause (see *Thomas*, *supra*, 489 F. 2d at 668). There is no doubt that the issuing judge was aware of the proper identity of the informant even if O'Keefe was incorrect in stating that Oxler had provided the name. As noted, O'Keefe already knew the informant's identity. Moreover, the record shows that Stewart had the same informant, and does not preclude the possibility that Stewart revealed him to O'Keefe. As to how O'Keefe learned of the station wagon, as noted, Oxler may well have given the description to O'Keefe. If not Oxler, then Lt. Larson could have been the one to provide this information (Tr. 345). Larson's source, while not personally known to the issuing judge to have been previously reliable, still could be credited since his information was in all respects identical to that furnished to the two other law enforcement officers by an informant of proven credibility.

[1031-1974-4]